ernmental agencies, particularly the Home Owners' Loan Corporation and the Federal Housing Administration, engaged in an interstate business of mortgage lending. For the extension of credit on most favorable terms and for the efficient operation of these agencies, uniformity is necessary. Finally, these federal agencies are behind the new act and are intent on securing its widespread adoption, thus exerting influences upon state legislatures which the 1927 proposal failed to command.

T. J. B.

NOTES

The Impostor and the Law

A type of fraud common to many fields of the law is that of fraud by impersonation. In whatever field it may occur, the important consideration is found in the intention of the party dealing with the impostor. This provides the basis for determining whether the impostor has obtained title to goods or to a negotiable instrument, whether he is guilty of a particular crime, or whether a valid contract has been formed. The fundamental rule with regard to intention is well illustrated by the law with respect to criminal assault in which the defense of mistaken identity often is pleaded. It is settled law that one may properly be convicted of assault with intent to kill the victim even though the evidence may show that the defendant mistook him for another whom, in fact, he had desired to slay.[1] The defendant intended to kill the man physically before him who, in reality, was the victim, and it is no defense that he might not have so intended had he been aware of the true identity of the latter. It is this theory of intention that will be found to dominate the impostor cases and hereinafter will be designated as the physical presence doctrine.

Criminal Law

The mental state of the victim often is relevant in determining the guilt or innocence of the defendant. Frequently, this becomes an issue in cases of alleged rape in discovering whether a victim has consented to the impostor's act and arises in larceny in determining whether title has passed to the impostor. Thus, in *State v. Brooks*,[2] where the defendant had carnal knowledge of a woman by falsely impersonating her husband, he was held not guilty of rape on the ground that she consented to intercourse with the man before her who, in fact, was the defendant, and, therefore, her consent constituted a valid defense.[3] However, a contrary theory is found in *Regina v. Dee*.[4] In holding the defendant guilty, the court said: ". . . In the cases of idiocy, of stupor, or of infancy, it is held that there is no legal consent, from the want of an intelligent and discerning will. Can a woman, in the case of personation, be regarded as consenting to the act in the exercise of an intelligent will? Does she consent, not knowing the real nature of the act? . . . she intends to consent to a lawful and marital act, to which it is her duty to submit. But did she consent to an act of adultery?" [5] Although

1. Isham v. State, 38 Ala. 213 (1862); People v. Wells, 145 Cal. 138, 78 Pac. 470 (1904); State v. Costa, 95 Conn. 140, 110 Atl. 875 (1920); CLARK AND MARSHALL, CRIMES (3d ed. 1927) § 43 (b) and notes thereto. *Contra:* Rex v. Holt, 7 C. & P. 518 (1836). See also Levitt, *Extent and Function of the Doctrine of Mens Rea* (1923) 17 ILL. L. REV. 578.

2. 76 N. C. 1 (1877).

3. Accord: Wyatt v. State, 2 Swan. 394 (Tenn. 1854); Regina v. Barrow, L. R. 1 C. C. R. 155 (1868).

4. L. R. 14 Ir. 468 (1884).

5. *Id.* at 479.

technically incorrect, a socially desirable result is thus obtained.[6] Rather than upset a logical and convenient theory in order to hold the defendant guilty in the particular instance, it would seem that the matter could better be settled by statute. England and several of our states recognizing this, have solved the problem in this manner.[7]

The doctrine of physical presence appears also in the larceny cases. In *Rex v. Story*,[8] defendant was held not guilty of larceny where he presented a money order to another and received payment thereon on the false representation that he was the named payee. There is no larceny as the victim intends to pass title to the man before him and thus the latter, if anything, is guilty of false pretenses.[9]

Non-Negotiable Contracts and Sales

In considering the application of the physical presence doctrine in these fields, and later in negotiable instruments, it will be helpful to keep in mind three sets of circumstances: (1) where the impostor deals in person with the other party, (2) where he carries on his dealings by correspondence, and (3) where either in person or by correspondence, he falsely represents himself to be the agent of some third person.

(1) In the case of non-negotiable contracts, where one person, by misrepresenting his identity, induces another, in his presence, to enter into negotiations with him, a valid contract is created.[10] The impostor, of course, intends to contract with the other party, while the latter intends to contract with the man before him, that is, the impostor. Thus, both parties possess the mental state requisite to the formation of the contract. For example, where one by impersonation procures an insurance policy in another's name, which policy contains an incontestable clause, the estate of the impostor may recover on the policy after the stated time within which it may be contested has passed. Intending to contract with the man before him, the agent for the insurance company has entered into a contract with the impostor.[11] However, the party impersonated could not recover on the policy since the insurance company never intended to contract with him.

In these cases, while there is a contract in existence, it is voidable between the parties because of the fraud,[12] and also against subsequent assignees of the impostor.[13] In general, such an assignee takes the contract subject to all the

6. In accord with Regina v. Dee, L. R. 14 Ir. 468 (1884), cited *supra* note 4, see State v. Shepard, 7 Conn. 54 (1828).

7. CRIMINAL LAW AMENDMENT ACT, 1885, 48 & 49 VICT. c. 69, § 4 reads as follows: "Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape." See also State v. Williams, 128 N. C. 573, 37 S. E. 952 (1901); Draughn v. State, 12 Okl. Cr. 479, 158 Pac. 890 (1916); Mooney v. State, 29 Tex. Cr. App. 257, 15 S. W. 724 (1890).

8. Russ. & R. 81 (1805).

9. See also Hudspeth v. Commonwealth, 195 Ky. 4, 241 S. W. 71 (1922); Rex v. Adams, Russ. & R. 225 (1812); CLARK AND MARSHALL, *op. cit. supra* note 1, § 318 (a), n. 130.

10. Gotthelf v. Shapiro, 136 App. Div. 1, 120 N. Y. Supp. 210 (2d Dep't, 1909); see Ludwinska v. John Hancock Mut. Life Ins. Co., 317 Pa. 577, 581, 178 Atl. 28, 30 (1935); 1 WILLISTON, CONTRACTS (Rev. ed. 1936) § 20; RESTATEMENT, CONTRACTS (1932) § 475; Ashley, *Mutual Consent in Contract* (1903) 3 COL. L. REV. 71.

11. See Ludwinska v. John Hancock Mut. Life Ins. Co., 317 Pa. 577, 581, 178 Atl. 28, 30 (1935); RESTATEMENT, CONTRACTS (1932) § 475, illus. 5. See also Gotthelf v. Shapiro, 136 App. Div. 1, 120 N. Y. Supp. 210 (2d Dep't, 1909).

12. Fay v. Hill, 249 Fed. 415 (C. C. A. 8th, 1918), 28 YALE L. J. 415 (1919); RESTATEMENT, CONTRACTS (1932) §§ 475, 476; RESTATEMENT, RESTITUTION (1937) § 28; 5 WILLISTON, CONTRACTS § 1517.

13. Boatsmen's Bank v. Fretzlen, 175 Fed. 183 (C. C. D. Kan. 1909); Morgan Munitions Supply Co. v. Studebaker Corp., 226 N. Y. 94, 123 N. E. 146 (1919); RESTATEMENT, CONTRACTS (1932) § 167.

defenses which the obligor may have had against the assignor. Exceptions have been made in cases of marriage contracts where the impostor, by false representations of his identity and social position, induces another to become his wife. Because of the policy of upholding marital relations, regardless of how obtained, most courts have held these contracts not to be voidable.[14] However, perhaps because of a more liberal concept of marriage, a few courts have permitted avoidance where the social consequences become serious.[15]

The impostor situation becomes increasingly important in the law of sales. The determination of whether or not the impostor has acquired a voidable title is controlling in deciding whether or not a subsequent purchaser in good faith obtains a right to the goods superior to that of the person defrauded. If the impostor obtained a voidable title, it becomes unimpaired in the hands of a bona fide purchaser,[16] but if the impostor had no property whatsoever in the goods, the owner, of course, may recover them from the transferee.

Where the impostor is dealing face to face with the seller, title to the goods, though a voidable one, is held to pass under the physical presence doctrine. The leading American decision is an early Massachusetts case, *Edmunds v. Merchants Dispatch Transportation Co.*,[17] where the impostor, falsely representing that he was a certain reputable merchant, obtained goods on credit. In an action against the carrier for wrongful delivery of the goods, the court, in holding that title to the goods passed to the impostor and that there had been no unauthorized delivery, stated: "The seller . . . could not have supposed he was selling to any other person (than the impostor); his intention was to sell to the person present, and identified by sight and hearing. . . ." [18] This view represents the overwhelming weight of authority,[19] and manifestly is desirable inasmuch as the seller, who by his credulity has made the fraud possible, bears the loss rather than an innocent transferee.[20] However, some courts have held that the impostor will not acquire title where he has given a forged check for the goods; hence, a subsequent transferee, though purchasing for value and for good faith, is not protected.[21] The theory of this minority is that because of public policy the impostor may not transfer his title which he acquired by means of the crime of larceny [22] or forgery. Although a salutary result is obtained, the logic of the minority is questionable.

Another form of impersonation, not heretofore mentioned, is where the impostor carries on his negotiations by telephone. While there is no direct

14. Marshall v. Marshall, 212 Cal. 736, 300 Pac. 816 (1931). See also 4 WILLISTON, CONTRACTS § 1031.

15. Brown v. Scott, 140 Md. 258, 117 Atl. 114 (1922), 22 COL. L. REV. 662; 4 WILLISTON, CONTRACTS § 1031. See Brown, *Duress and Fraud as Grounds for the Annulment of Marriage* (1935) 10 IND. L. J. 471; Note (1925) 73 U. OF PA. L. REV. 195.

16. White v. Dodge, 187 Mass. 449, 73 N. E. 549 (1905); Phelps v. McQuade, 220 N. Y. 232, 115 N. E. 441 (1917). See Lightman v. Boyd, 132 Ala. 618, 619, 32 So. 714, 715 (1902).

17. 135 Mass. 283 (1883).

18. *Id.* at 283.

19. Phelps v. McQuade, 220 N. Y. 232, 115 N. E. 441 (1917); Phillips v. Brooks, [1919] 2 K. B. 243; 2 WILLISTON, SALES (2d ed. 1924) § 635; MARIASH, SALES (1930) § 363; UNIFORM SALES ACT § 24, 1 U. L. A. 193. See also ANSON, CONTRACTS (1929) § 212, n. 6. *Contra:* Windle v. Citizens Nat. Bank, 204 Mo. App. 606, 216 S. W. 1023 (1920), 4 MINN. L. REV. 460.

20. Hickey v. McDonald, 151 Ala. 497, 44 So. 201 (1907); Martin v. Green, 117 Me. 138, 102 Atl. 977 (1918).

21. Gustafson v. Equitable Loan Ass'n, 186 Minn. 236, 253 N. W. 106 (1932); Amols v. Bernstein, 214 App. Div. 469, 212 N. Y. Supp. 518 (1st Dep't, 1926), 74 U. OF PA. L. REV. 749, 26 COL. L. REV. 636, 11 CORN. L. Q. 422, 39 HARV. L. REV. 904. *Cf.* Linn v. Reid, 114 Wash. 609, 196 Pac. 13 (1921).

22. These courts are wrong in assuming larceny has been committed. Inasmuch as the dealings are face to face, the party defrauded intends to pass title and, therefore, the impostor is not guilty of larceny.

decision on this point, it would seem that title to goods obtained in this manner should pass.[23] In *Tideman & Co. v. McDonald*,[24] the defendant accepted the plaintiff's offer over the telephone, thinking that plaintiff was another person. The court held that this mistake in identity did not prevent the existence of a contract. It would appear that the intention of the offeree was to contract with the person with whom he was speaking. Furthermore, this would seem to be the suggestion of section 65 of the *Restatement of Contracts*: "Acceptance by telephone is governed by the principles applicable to oral acceptances where the parties are in the presence of each other." [25] Applying this then to a case where an impostor uses the telephone, it would follow that the impostor would get a voidable title which would protect subsequent innocent purchasers. Since the seller has chosen to rely on his sense of hearing in identifying the impostor, it is more equitable that he bear the loss rather than the innocent purchasers.

(2) The problem next arises in the case of an impostor, who, negotiating by letter, induces another to enter into an agreement with him by falsely representing himself to be an acquaintance of the defrauded party. The question as to the existence of a contract becomes important only where the defrauded party seeks to enforce the agreement, for as against the impostor or a subsequent assignee, it may be avoided. In this situation, however, it is generally held that no contract exists at all.[26] The intention of the party receiving the letter is to enter into an agreement with the person whose name is signed thereon. He does not contemplate any dealings with the impostor in view of his ignorance of the existence of the latter. There is, of course, no binding agreement between the defrauded party and the person whose name appeared on the letter inasmuch as the latter never assented to any contract.

Similarly, in the case of a sale, where the negotiations are by correspondence, the impostor gets no title.[27] The leading case is *Cundy v. Lindsay*,[28] in which the impostor, through a written order, obtained goods from the plaintiff and, in turn, sold them to defendants who were innocent purchasers. Defendants transferred the goods to other innocent parties. In an action for conversion, it was held that the plaintiffs could recover. Although the impostor had obtained possession of the goods, he had never acquired any title which he could transfer to defendants. Therefore, a sale by them constituted a conversion. As stated by the court in *Phelps v. McQuade*,[29] in which the *Cundy* case was discussed, ". . . the vendor intends to deal with the person whose name is signed to the letter. He knows no one else. He supposes he is dealing with no one else." Thus, it is clear that the impostor obtains no title to the goods.

However, where the impostor in ordering goods, signs a purely fictitious name to a letter, it has been held that title will pass.[30] The seller, having no

23. See Selma Savings Bank v. Webster County Bank, 182 Ky. 604, 609, 206 S. W. 870, 872 (1918); Fox River Butter Co. v. Lightning Motor Line, 125 Misc. 116, 122, 210 N. Y. Supp. 172, 177 (Sup. Ct. 1926).

24. 275 S. W. 70 (Tex. Civ. App. 1926), 39 HARV. L. REV. 388, 4 TEX. L. REV. 252.

25. See 5 WILLISTON, CONTRACTS § 1517, n. 1.

26. See Cundy v. Lindsay, 3 A. C. 459 (1878); ANSON, CONTRACTS (1929) § 212; RESTATEMENT, CONTRACTS (1932) § 475.

27. School Sisters of Notre Dame v. Kusnitt, 125 Md. 323, 93 Atl. 928 (1915); Brighton Packing Co. v. Butcher's Slaughtering and Melting Ass'n, 211 Mass. 398, 97 N. E. 780 (1912); Phelps v. McQuade, 220 N. Y. 232, 115 N. E. 441 (1917); Newberry v. Norfolk & S. R. R., 133 N. C. 45, 45 S. E. 356 (1903); Cundy v. Lindsay, 3 A. C. 459 (1878); see Bond Trouser Co. v. American Ry. Exp. Co., 124 Misc. 619, 620, 208 N. Y. Supp. 643, 645 (N. Y. City Ct. 1925); ANSON, CONTRACTS (1929) § 212; 5 WILLISTON, CONTRACTS § 1517; RESTATEMENT, CONTRACTS (1932) § 475.

28. 3 A. C. 459 (1878).

29. 220 N. Y. 232, 235, 115 N. E. 441, 442 (1917).

30. Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433 (1885); King's Norton Metal Co. v. Elridge, Merrett & Co., 14 T. L. R. 98 (C. A. 1897), 5 WILLISTON, CONTRACTS § 1517.

acquaintance with an individual of that name, intends to deal with the person represented by the signature. The impostor, having adopted that name for this transaction, acquires title.

(3) Where, either in person or by correspondence, the impostor falsely represents that he is acting as the agent of some third person and thus purports to enter into a contract on behalf of an alleged principal, the agreement is a nullity inasmuch as the innocent party has only consented to dealings with the alleged principal and the latter has never agreed to the transaction.[31] In like manner, where the impostor gets possession of goods under a similar pretense, title to the goods does not pass.[32]

Negotiable Instruments

In the field of negotiable instruments, the desire of the courts to foster the negotiability of the instrument will be found to underlie the holdings in the impersonation cases departing from rules applicable in other branches of the law.

(1) Where the impostor is physically present, the maker is conclusively presumed to have intended to make the instrument payable to the person before him. A subsequent endorsement by the impostor, therefore, is not a forgery and passes good title to the instrument, protecting subsequent bona fide purchasers.[33] Inasmuch as the same rule is applied in other branches of the law and in view of the added incentive to foster negotiability, this is evidently the only proper result.

(2) Where, however, the dealings are by correspondence, in contrast to the rule adopted in the law of sales and contracts, the tendency is to hold that title passes and that a holder in due course from the impostor may recover on the instrument.[34] The courts, for the purpose of furthering negotiability, readily find that the intention of the maker is to make the instrument payable to the one who wrote the letter. Since the defrauded party is more at fault than the innocent transferee, this is a preferable result and one which might well be adopted in the sales cases.

(3) However, where the wrongdoer represents himself to be the agent of a purported principal, either fictitious or real, the decision cannot be the same. Under no stretch of the imagination does the maker intend the instrument to be payable to the party before him. He contemplates dealings not with the impostor, but with another, the alleged principal, and, therefore, title does not pass.[35]

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31. Smith Typewriter Co. v. Stidger, 18 Colo. App. 261, 71 Pac. 400 (1903); Rogers v. Dutton, 182 Mass. 187, 65 N. E. 56 (1902); RESTATEMENT, CONTRACTS (1932) § 475, comment *a*.

32. Indianapolis Saddlery Co. v. Curry, 193 Ind. 346, 138 N. E. 337 (1923); Edmunds v. Merchants Dispatch Transportation Co., 135 Mass. 283 (1883); Cohen v. Savoy Restaurant, 189 N. Y. Supp. 71 (Sup. Ct. 1921); Decan v. Shipper, 35 Pa. 239 (1860); Gose v. Brooks, 229 S. W. 979 (Tex. Civ. App. 1921).

33. Ryan v. Bank of Italy Nat. Trust & Savings Ass'n, 106 Cal. App. 690, 289 Pac. 863 (1930); Montgomery Garage Co. v. Manufacturer's Liab. Ins. Co., 94 N. J. L. 152, 109 Atl. 296 (1921); Land Title & Trust Co. v. Northwestern Nat. Bank, 211 Pa. 211, 60 Atl. 723 (1905); North Phila. Trust Co. v. Kensington Nat. Bank, 196 Atl. 14 (Pa. 1938); Defiance Lumber Co. v. Bank of Calif., 180 Wash. 533, 41 P. (2d) 135 (1935); see Montgomery Ward & Co. v. Central Co-operative Ass'n, 276 N. W. 731 (Minn. 1937); BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) 306. See also Notes (1930) 35 DICK. L. REV. 90, (1920) 34 HARV. L. REV. 76.

34. Boatsman v. Stockmen's Nat. Bank, 56 Colo. 495, 138 Pac. 754 (1914); Uriola v. Twin Falls Bank & Trust Co., 37 Idaho 332, 215 Pac. 1080 (1923); Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 11 Pac. 141 (1886). *Contra:* Palm v. Watt, 7 Hun. 317 (N. Y. 1876); Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N. Y. Supp. 1017 (1st Dep't, 1911), *aff'd*, 210 N. Y. 567, 104 N. E. 1134 (1914). See 5 WILLISTON, CONTRACTS § 1517B.

35. Strang v. Westchester County Nat. Bank, 235 N. Y. 68, 138 N. E. 739 (1923), 23 COL. L. REV. 495, 7 MINN. L. REV. 582; United Cigar Stores v. American Raw Silk Co., 184 App. Div. 217, 171 N. Y. Supp. 480 (1st Dep't, 1918); Goodfellow v. First Nat. Bank, 71 Wash. 554, 129 Pac. 90 (1913).

Until recently, with only a few exceptions now generally regarded as legal anomalies,[36] the courts have consistently held that where the impostor in person obtains a note made out to him in his assumed name, he gets title.[37] However, during the past two years, two courts have gone out of their way to hold that title does not pass and that the loss occasioned by the fraud should fall on the bona fide transferee from the impostor. In *Keel v. Wynne*,[38] the defendant, a court clerk, held money due one *X* under a court order. *X's* brother represented to defendant that he was *X*, whereupon the defendant made out a check for the amount due and handed it to the impostor. Later, in the presence of the plaintiff, the impostor indorsed "*X*" on the back of the check and the plaintiff guaranteed the signature. Subsequently becoming liable on his indorsement, the plaintiff failed to recover his loss in a suit against the clerk. It would seem clear that the defendant intended to make the check payable to the man before him, who was the impostor, and, being the payee, the latter, by his indorsement, could pass title to the instrument.[39]

In *Cohen v. Lincoln Savings Bank*,[40] the impostor, posing as assignor of a certain condemnation award, induced the holder of a check to deliver it to him, indorsed to the real assignor. The impostor, after indorsing it with the assignor's name, transferred it to a bona fide purchaser for value. It was held[41] that the loss should fall on the innocent transferee. The New York Court of Appeals declared that even though the dealings were face to face, the intention of the holder was not to transfer title to the party before him but to the individual he assumed to be. Furthermore, the court remarked that the physical presence doctrine applies only where there have been prior dealings between the parties. Inasmuch as this requirement is unwarranted from the standpoints of both authority and reason, it is to be hoped that these decisions do not indicate a new trend in the law.

Summary

It is a reasonable rule of construction that where one deals in person with an impostor, he intends to deal with the party before him and not with the person whom the impostor purports to be. The same rule seems to prevail where the dealings are by telephone. Where, however, the dealings are by correspondence, it is generally held that the intention is to deal with the person whose name was signed to the letter or if a fictitious name is employed, with the party signing the letter inasmuch as he is presumed to have adopted the name for this transaction. However, exceptions exist in the field of negotiable instruments where, in order to foster ready negotiability, it is presumed that the intention of the maker is to make the instrument payable to the signer of the letter and, therefore, title to the instrument is held to pass. But where the impostor, either in person or by letter, represents that he is acting as agent for another, it is universally held that no title passes inasmuch as the intention could not have been to contract with the impostor himself but rather with an alleged principal. Thus, it appears that until recently, these questions were, for the most part, accepted law based on both reason and convenience. It would be unfortunate, indeed, should the most recent

36. The minority consists only of Miners & Merchants Bank v. St. Louis Smelting & Refining Co., 178 S. W. 211 (Mo. 1915); Tolman v. American National Bank, 22 R. I. 462, 48 Atl. 480 (1901); Rolling v. El Paso & S. W. Ry., 127 S. W. 302 (Tex. Civ. App. 1910); Simpson v. Denver & R. G. R. R., 43 Utah 105, 134 Pac. 883 (1913). See BRANNAN, NEGOTIABLE INSTRUMENTS LAW WITH COMMENTS AND CRITICISMS (1908) 128.

37. For helpful annotations, see Notes (1923) 22 A. L. R. 1228, (1928) 52 A. L. R. 1326.

38. 210 N. C. 426, 187 S. E. 571 (1936).

39. See discussion of case in Note (1936) 15 N. C. L. REV. 186.

40. 275 N. Y. 399, 10 N. E. (2d) 457 (1937), 86 U. OF PA. L. REV. 209.

41. Hubbs, J., and Crane, C. J., dissenting.

holdings lay a foundation for upsetting a field of law heretofore so satisfactorily settled.

C. C. J., Jr.

Supersedure of State Laws by Federal Regulations Under the Commerce Clause

The supremacy of Congressional power over interstate commerce, by virtue of the commerce clause,[1] never has been seriously questioned.[2] At the same time, it is well recognized that the states, from the dawn of our national existence, have exercised a substantial degree of control over such matters.[3] The nature of this dual control has long constituted a favorite topic for legal discussion.[4] However, the prevailing constitutional theory may be conveniently crystallized in the following analysis: In matters of national concern (those requiring uniformity of regulation), the power to regulate interstate commerce is vested exclusively in Congress.[5] However, through the exercise of its police power and in the absence of conflict with the *will of Congress,* a state may enact general laws governing its internal affairs which incidentally affect commerce of national import.[6] Under these circumstances, however, the absence of federal legislation permitting such state control has been interpreted to be evidence of the intent of Congress to preclude state action within the sphere.[7] On the other hand, where the subject is one of local concern, state regulation is permissible unless it conflicts with federal laws governing the subject.[8] Thus, in the latter situation, the silence of Congress is held, although inconsistently, to mean that the operation of the state law shall not be impaired. However, even in the absence of conflict, should the state statute be found to have entered a field which Congress intended to occupy through some affirmative act of legislation, the state rule will be rendered totally ineffective.[9] Thus stated, the formula appears clear. However, in view of the flexibility of many of the terms involved, its application in a given situation may become a

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1. U. S. CONST. Art. I, § 8.

2. Minnesota Rate Cases, 230 U. S. 352, 398-399 (1913); Southern Ry. v. Railroad Comm., 236 U. S. 439, 446 (1913); Missouri Pac. R. R. v. Stroud, 267 U. S. 404, 408 (1925).

3. See RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937) 182-201, 230.

4. GAVIT, THE COMMERCE CLAUSE (1932) §§ 1-11; LEWIS, FEDERAL POWER OVER COMMERCE (1892) §§ 70-85; RIBBLE, *op. cit. supra* note 3; WILLIS, CONSTITUTIONAL LAW (1936) 297; Cooke, *The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce* (1911) 20 YALE L. J. 297; Needham, *The Exclusive Power of Congress Over Interstate Commerce* (1911) 11 COL. L. REV. 251.

5. Robbins v. Shelby County Taxing Dist., 120 U. S. 489 (1887); Sanitary Dist. of Chicago v. United States, 266 U. S. 405 (1925).

6. *In re* Rahrer, 140 U. S. 545 (1891); Clark Distilling Co. v. Western Md. Ry., 242 U. S. 311 (1917). These cases held, in effect, that where Congress had indicated, by express legislation, that the exercise of state power was permissible, the state enactment was effective even though the court recognized the national character of the commerce affected. For an excellent analysis of the foregoing decisions, see Biklé, *The Silence of Congress* (1927) 41 HARV. L. REV. 200.

7. Bowman v. Chicago & N. Ry., 125 U. S. 465 (1888); Leisy v. Hardin, 135 U. S. 100 (1890).

8. Minnesota Rate Cases, 230 U. S. 352 (1913); Pennsylvania Gas Co. v. Public Service Comm., 252 U. S. 23 (1920). There is occasional language, particularly in the earlier cases, to the effect that such control results from the exercise of the state police power which "incidentally affects" interstate commerce of a local nature. However, the actual holdings leave but little doubt that the power of the states to regulate commerce of this character has long been permitted by the Supreme Court.

9. Northern Pac. Ry. v. Washington, 222 U. S. 370 (1912), 10 MICH. L. REV. 555; Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 (1926), 74 U. OF PA. L. REV. 852.

source of considerable uncertainty. Thus, the distinction between laws which merely affect and those which regulate interstate commerce of a national character, the boundaries between matters of local and those of national concern, the discovery of the Congressional intent to occupy a given field and the determination of the field occupied, may all eventually resolve themselves into pure questions of judicial opinion.[10] The problems involved in determining what constitutes a valid exercise of state authority during the inaction of Congress are not, however, within the scope of the present discussion.[11] Having established the validity of such state control, varied difficulties may arise when Congress breaks its silence.

"Occupying the Field"—In General

It has already been indicated that a state law conflicting with a rule established by Congress will be inoperative. Moreover, where both enactments coincide in their field of operation, the state rule, although consistent with the federal enactment, nevertheless will be superseded since, in view of the principle of federal supremacy, there can be no such divided authority.[12] In addition, since the validity of state legislation affecting interstate commerce in its local aspects is predicated upon the will of Congress, should the latter manifest a desire to assume exclusive control over the "field" in question, all state laws within the field occupied must fall, irrespective of the existence of federal regulations governing the same matter.[13] The application of the latter doctrine, however, often will present a source of difficulty in which may center marked divergencies of opinion. The discovery of the Congressional will to occupy a given field and the ascertainment of its exact limits is, fundamentally, a pure question of statutory construction and, as such, may offer broad opportunities for judicial interpretation and implication. It is not surprising, therefore, to find inconsistent holdings flowing from applications of the same doctrine. Thus, the Federal Hours of Service Act,[14] although not operative until a year after its passage, nevertheless was held to have occupied the field immediately with resultant supersedure of state rules during the interim.[15] This was so despite the fact that no federal regulations were yet in existence with which a state law could coincide or conflict. From a consideration of the foregoing decision, it would not be illogical to suppose that whenever Congress enacts a law *relating to* a given field, the whole field is immediately occupied precluding state activity within the same realm. But nothing could be more misleading. Thus, the provisions of the Federal Food and Drug Act prohibiting a misstatement of the contents of food products[16] were declared insufficient to

10. RIBBLE, *op. cit. supra* note 3, 183, 212-214; Powell, *Current Conflict Between the Commerce Clause and State Police Power, 1922-1927* (1928) 12 MINN. L. REV. 607, 608.

11. See Powell, *supra* note 10, 321, 325, 470.

12. Chicago, R. I. & P. Ry. v. Hardwick Farmers Elevator Co., 226 U. S. 426 (1913); Erie R. R. v. New York, 233 U. S. 671 (1914); Southern Ry. v. Railroad Comm., 236 U. S. 439 (1915).

13. Northern Pac. Ry. Co. v. Washington, 222 U. S. 370 (1912), 10 MICH. L. REV. 555; Adams Express Co. v. Croninger, 226 U. S. 491 (1913), 26 HARV. L. REV. 456; Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 (1926), 74 U. OF PA. L. REV. 852; see Southern Ry. v. Reid, 222 U. S. 424, 435 (1912); RIBBLE, *op. cit. supra* note 3, c. 10. In a number of recent treatises, the term "conflict implied-in-law" has been used to describe the nature of the instant theory. GAVIT, THE COMMERCE CLAUSE (1932) § 121; WILLIS, CONSTITUTIONAL LAW (1936) 299. Such terminology, however, is misleading inasmuch as the theory of supersedure in the specific instance is not conflict between federal and state laws but the intent of Congress to assume exclusive control over the subject to the exclusion of state power.

14. 34 STAT. 1416 (1907), 45 U. S. C. A. § 62 (1928).

15. Northern Pac. Ry. v. Washington, 222 U. S. 370 (1912), 10 MICH. L. REV. 555.

16. 34 STAT. 768 (1906), 21 U. S. C. A. § 2 (1927).

invalidate state laws requiring a complete disclosure of the same.[17] In the latter case, the court found two distinct fields of legislation giving rise to independent spheres of operation. The existence of federal and state enactments with respect to the same subject was not seriously considered. It is evident, therefore, that more fundamental considerations than fine legal distinctions must exist. In the latter case, the court apparently sympathized with the purpose of the state enactment and the flexibility of the judicial dogma afforded a convenient means of upholding its validity. An explanation of the former decision will probably be found to lie in the prevailing economic philosophy of the court. The divergent theories employed in determining the intent of Congress to occupy a given field are also worthy of notice inasmuch as either have been consistently used according to the result obtained. Where occupation was found to have occurred, the fact that Congress had enacted legislation relating to the subject became the focal point of judicial construction.[18] Where no occupation was discovered, the court declared that the intent of Congress to invalidate noncoincident state legislation was not to be inferred in the absence of actual conflict.[19] It is evident that, in the absence of an expressed Congressional intent to the contrary, a strict application of the latter rule of construction would entirely abrogate the theory of supersedure without coincidence or conflict. An attempt to reconcile all the various holdings would accomplish no worthy purpose. The apparent state of confusion already has been a source of legal comment,[20] but the problem of when supersedure will be found to occur, in the absence of conflicting state legislation, has been generally placed aside. As is discernible from the foregoing discussion, a definite formula, universally applicable, is impossible of concoction. However, through the process of classification and comparison, certain rules and tendencies in judicial construction will be discovered.

"Occupying the Field"—Rules and Tendencies of Judicial Interpretation

1. Invalid Federal Enactment: Where a Congressional enactment, regulating some phase of interstate commerce, is later found to be void because contravening some constitutional limitation, how indicative is this of the intent of Congress? Such a question arose in connection with the first Federal Employers' Liability Act [21] which had been invalidated as exceeding the powers of Congress under the commerce clause.[22] It was held that all state laws on the subject were effective since the Federal Enactment was "as inoperative as if it had never been passed, for an unconstitutional act is not a law and can neither confer a right or immunity nor operate to supersede any existing valid law." [23] The Congressional act must have been passed with the assumption that it would be effective. In view of the serious social effects that might have resulted, it clearly would have been unreasonable to infer a legislative intent to nullify existing state control even should the Federal Enactment be rendered inoperative. Apparently, this constitutes the only decision on the point and the adjudication reached evidently is desirable.

2. Effect of Expiration of Federal Statute: Similar problems may arise when the effective period of a federal law has expired or when the Congressional enactment is repealed. Assuming that the state law which had been superseded has

17. Savage v. Jones, 225 U. S. 501 (1912).

18. Northern Pac. Ry. v. Washington, 222 U. S. 370, 378 (1912).

19. Savage v. Jones, 225 U. S. 501, 533 (1912).

20. Grant, *The Scope and Nature of Concurrent Power* (1934) 34 COL. L. REV. 995, 1038.

21. 34 STAT. 232 (1906).

22. Employers' Liability Cases, 207 U. S. 463 (1908).

23. Chicago, I. & L. Ry. v. Hackett, 228 U. S. 559, 566 (1913).

never been repealed, does it again govern the subject within its jurisdiction? It has been held that, with the removal of federal restrictions, it becomes operative again without the necessity of a reenactment.[24] The revival of a state law, after a long period of supersedure, conceivably may result in the imposition of a law no longer suited to the needs of the social group. On the other hand, if the federal enactment has only been effective for a short period, it may be manifestly unwise to deny the further operation of state laws. Thus, the desirability of the rule will depend on the individual circumstances involved.

3. Power of Investigation Granted Administrative Tribunal: Congress may authorize an administrative body to investigate and report upon the need for federal regulation of a given field. Several lower court decisions, involving such a state of facts, have been handed down recently in connection with certain of the provisions of the Federal Motor Carriers Act.[25] As might have been expected, the courts were unanimous in finding no supersedure.[26] To have construed such an authorization as indicative of the Congressional will to assume control over the field of legislation evidently would have constituted a strained legalism. In any event, the Supreme Court has already held that an intent to supersede existing state laws will not be inferred from the grant of a mere power of investigation.[27]

4. Administrative Body or Official Vested With Authority over Subject but, as Yet, No Regulations Promulgated: Where Congress has vested an administrative tribunal or official with authority to prescribe regulations over a given subject, the question has arisen as to whether this alone constitutes an occupation of the field. Inconsistent rulings have resulted giving rise to a number of dissenting opinions. On the one hand, it was held that the amended Locomotive Boiler Inspection Act,[28] vesting the Interstate Commerce Commission with full control over the general subject indicated, superseded state legislation requiring certain necessary locomotive equipment and this was so despite the fact that the Commission had failed to take any action with regard to the precise matter.[29] So, also, a federal statute vesting the Secretary of Agriculture with authority to make regulations with respect to certain quarantines was declared to have invalidated existing state legislation on the subject although no administrative regulations had been promulgated.[30] A dissent was interposed in which the validity of such an implication was denied [31] and, shortly afterwards, a joint Congressional resolution was passed indicating a desire that state laws should operate in the interim.[32] On the other hand, it has been held that the mere grant to the Interstate Commerce Commission of a large measure of control over interstate commerce

24. Missouri Pac. R. R. v. Boone, 270 U. S. 466 (1926).

25. 49 STAT. 566 (1935), 49 U. S. C. A. § 325 (Supp. 1937).

26. L. & L. Freight Lines v. Railroad Comm., 17 F. Supp. 13 (S. D. Fla. 1936); Barnwell Bros. v. South Carolina State Highway Dep't, 17 F. Supp. 803 (E. D. S. C. 1937); Werner Transp. Co. v. Hughes, 19 F. Supp. 425 (N. D. Ill. 1937).

27. Atlantic Coast Line R. R. v. Georgia, 234 U. S. 280 (1914).

28. 43 STAT. 659 (1924), 45 U. S. C. A. §§ 23 *et seq.* (1928).

29. Napier v. Atlantic Coast Line R. R., 272 U. S. 605 (1926); *cf.* Western Union Tel. Co. v. Boegli, 251 U. S. 315 (1920).

30. Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 (1926), 74 U. OF PA. L. REV. 852.

31. Justices McReynolds and Sutherland, dissenting, declared that it would be "a serious thing to paralyze the efforts of a state to protect her people against impending calamity and leave them to the slow charity of a far-off and perhaps supine federal bureau." *Id.* at 103.

32. 44 STAT. 250 (1926), 7 U. S. C. A. § 161 (Supp. 1937). For a similar situation, compare Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 (U. S. 1851) with *id.*, 18 How. 421 (U. S. 1855).

33. Missouri Pac. Ry. v. Larabee Flour Mills Co., 211 U. S. 612 (1909).

would not affect state control in the absence of administrative action.[33] Another dissent was interposed in which it was declared that inasmuch as the Commission was authorized to deal with the subject, state legislation should have been precluded.[34] In a more recent decision, it was held that although the Commission had authority over depreciation rates of telephone companies, state laws were still applicable where no final regulations had been made.[35] Even where administrative orders were made but were uncertain in their field of operation, it has been held that supersedure had not resulted.[36] From the foregoing review, it seems difficult to extract a governing principle. The ultimate decision would thus appear to depend upon the individual case and the judicial end desired. Certainly, it is desirable that such a Congressional enactment should be ineffective to supersede state laws as long as no administrative action has been taken. A contrary adjudication can only leave the field devoid of regulation with probable harmful social consequences.

5. Postponed Date of Effectiveness: Other difficulties may arise when the effective date of a federal statute is postponed. In a case involving the Federal Hours of Service Act, to which reference has already been made,[37] it was held that state laws were superseded during the interval. In that case, decided in 1911, it was said that the purpose of the postponement was "to enable necessary adjustments to be made by the railroads to meet new conditions created by the act . . . ." [38] No subsequent decision has been found. As indicated previously, the theory employed in determining the intent of Congress centered about the fact that federal legislation had been enacted with respect to the subject.[39] Thus, in view of the peculiar facts involved and the present trend to require coincidence or inconsistency before supersedure will be declared,[40] it appears doubtful whether, in the ordinary case, the same rule would be enunciated today.

6. Subject Partially Covered by Sporadic Enactments: Only two cases have been found involving situations in which a given subject has received sporadic attention in the form of occasional Congressional enactments. However, no supersedure was found in either case, the court being reluctant to invalidate the state law in the absence of conflict or coincidence. In both instances, the state enactment had filled a real need that Congress had failed to consider. One case involved a state statute requiring locomotive headlights of a certain intensity; federal enactments relating to almost every other type of locomotive equipment were in existence.[41] Another case, decided during the present term of the Supreme Court, held that state legislation governing the inspection of hulls and machinery of motor driven tug boats was not abrogated by the Federal Motor Boat Regulations Act [42] and various other federal enactments which, although extensively regulating vessel inspection, lacked provisions on the specific matter.[43] In both cases the court declared that Congress had only occupied a limited field.

7. Extensive Federal Enactment—State Law Either Filling Gap or Providing Additional Rules: The greatest number of decisions involving the doctrine of

34. *Id.* at 626.
35. Smith v. Illinois Bell Tel. Co., 282 U. S. 133 (1930).
36. Illinois Cent. R. R. v. State Public Utilities Comm., 245 U. S. 493 (1918).
37. Northern Pac. Ry. v. Washington, 222 U. S. 370 (1912), *supra* note 15.
38. *Id.* at 379.
39. *Id.* at 378.
40. See *infra* note 80.
41. Atlantic Coast Line R. R. v. Georgia, 234 U. S. 280 (1914).
42. 36 STAT. 462 (1910), 46 U. S. C. A. §§ 511-520 (1928).
43. Kelly v. Washington *ex rel.* Foss Co., 302 U. S. 1 (1937), 51 HARV. L. REV. 357.

supersedure has arisen in connection with cases in which Congress has enacted broad or extensive legislation with regard to a given subject but had failed to include provisions on a given point. The validity of state legislation that either filled the gap or provided additional rules was thus subject to attack. With respect to the field occupied, the silence of Congress on the specific point is thus capable of two opposing inferences: (1) no regulation was desired at all, or (2) federal regulation was not desired inasmuch as it was the intent of Congress that the particular matter should remain under state control. In the usual case, the discovery of the intent of Congress merely constitutes the creation of a fiction as the omission probably has been the result of inadvertence. Although no attempt will be made to reconcile all the decisions, an analysis of actual results obtained will illustrate distinct tendencies in judicial interpretation, according to the nature of the subject involved.

(a) *State Quarantines:* With the exception of a single case, to which reference has already been made,[44] the Supreme Court has consistently demonstrated its diligence in upholding state quarantine legislation. Thus, a Congressional enactment declaring it an offense for one knowingly to transport diseased livestock from one state to another was held not to invalidate state requirements of a certificate of health irrespective of the shipper's actual knowledge of the condition of the cattle.[45] Again, a later federal statute requiring the obtaining of a similar certificate prior to interstate transportation of cattle was held not to supersede state legislation requiring like certificates to be secured from state [46] or federal [47] officials.

(b) *Foods and Drugs:* A similar tendency may be discovered with respect to state food and drug laws. Thus, the provisions of the Federal Food and Drugs Act prohibiting interstate commerce in adulterated or misbranded articles [48] were held insufficient to supersede state laws requiring disclosure of the contents [49] and the use of specified labels,[50] or to invalidate a state prohibition against the shipment of fruit either immature or unfit for consumption.[51] Again, state restrictions on the prescription of narcotic drugs by physicians within the course of their professional practice were held not to have been superseded by the Harrison Anti-Narcotic Drug Act [52] which, although providing broad regulations, failed to impose similar limitations.[53]

(c) *Migratory Game:* With regard to state efforts at game conservation, the Supreme Court has displayed an equally sympathetic attitude. Thus, the Federal Migratory Bird Act declaring all such game to be within federal protection and

44. Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 (1926), *supra* note 30.

45. Reid v. Colorado, 187 U. S. 137 (1902); *cf.* Missouri, K. & T. Ry. v. Haber, 169 U. S. 613 (1898).

46. Mintz v. Baldwin, 289 U. S. 346 (1933).

47. Asbell v. Kansas, 209 U. S. 251 (1908). In view of the coincidence of regulations in the instant case, it seems that supersedure should have resulted. However, the case affords an excellent illustration of the sympathetic attitude of the court toward the type of state legislation involved.

48. 34 STAT. 768 (1906), 21 U. S. C. A. § 2 (1927).

49. Savage v. Jones, 225 U. S. 501 (1912).

50. Armour & Co. v. North Dakota, 240 U. S. 510 (1916); Corn Products Refining Co. v. Eddy, 249 U. S. 427 (1919).

51. Sligh v. Kirkwood, 237 U. S. 52 (1915).

52. 38 STAT. 785 (1914), 26 U. S. C. A. § 1043 (b) (1935).

53. Minnesota *ex rel.* Whipple v. Martinson, 256 U. S. 41 (1921).

providing regulations with regard to closed seasons and related matters,[54] was held not to have invalidated state prohibitions against the shipment of wild ducks.[55]

(d) *Warehouse and Exchange Regulations:* With regard to state laws relating to warehouses and exchanges, similar tendencies may be noted. Thus, in the absence of conflict or coincidence, the comprehensive Federal Grain Standards Act [56] was declared not to have superseded state legislation prescribing the qualifications of grain weighers.[57] Likewise, the broad Federal Tobacco Inspection Act [58] was held not to invalidate state requirements with respect to the sale of leaf tobacco.[59] Again, a state provision requiring specified commission merchants to procure licenses, keep certain records and post bonds was not invalidated by the Federal Perishable Agricultural Commodities Act [60] which, in regulating the same subject, failed to impose the necessity of a bond.[61] Also, the Federal Grain Futures Act [62] prescribing regulations for trading in futures was held not to have voided a state bucket shop law which declared certain practices, not prohibited by the Federal Act, to be illegal.[63]

(e) *Port Pilotage:* Similarly, state port pilotage provisions have been upheld in the face of broad federal enactments by distinguishing between port pilots and voyage pilots entering port, the federal enactment being construed to be applicable only in the latter situation.[64] In addition, a differentiation has been made between enrolled and registered vessels, the court holding that where the latter are expressly exempt from the application of the federal provisions, the operation of state control is not intended to be precluded.[65]

(f) *Railroad Regulation:* With the exception of isolated instances, the tendency to nullify state control over railroads has been marked. It is suspected that the source of this judicial paternalism probably lies in an admixture of the historic policy of fostering railroad development, the feeling that the subject was one peculiarly requiring federal regulation and, possibly, in the earlier careers of many of the Supreme Court justices. Thus, the second Federal Employers' Liability Act imposing civil liability for injuries due to the negligence of the carrier and also providing a death statute in connection therewith,[66] was held to have occupied the field to the exclusion of state laws making proof of injury by a locomotive prima facie evidence of negligence [67] or declaring it to be negligence per se

54. 37 STAT. 847 (1913). This Act was later superseded by another Federal Enactment on the same subject. 40 STAT. 755 (1918), 16 U. S. C. A. § 705 (1926). The validity of the former Act, which was based on the commerce power, was never passed upon by an appellate court but § 4 of the present Act would appear to be a permissible regulation of interstate commerce.

55. Carey v. South Dakota, 250 U. S. 118 (1919).

56. 39 STAT. 482, 484 (1916), 7 U. S. C. A. §§ 74, 79 (1927).

57. Merchants Exchange of St. Louis v. Missouri *ex rel.* Barker, 248 U. S. 365 (1919).

58. 49 STAT. 731 (1935), 7 U. S. C. A. §§ 511 *et seq.* (Supp. 1936).

59. Townsend v. Yeomans, 301 U. S. 441 (1937).

60. 46 STAT. 531 (1930), 7 U. S. C. A. §§ 499a *et seq.* (Supp. 1936).

61. Hartford Accident & Indemnity Co. v. Illinois, 298 U. S. 155 (1936). Although the court pointed out that the Federal Act specifically exempted consistent state laws, the case was not decided on this ground.

62. 42 STAT. 998 (1922), 7 U. S. C. A. §§ 1 *et seq.* (1927).

63. Dickson v. Ulhmann Grain Co., 288 U. S. 188 (1933).

64. Steamship Co. v. Joliffe, 2 Wall. 450 (U. S. 1864).

65. Anderson v. Pacific Coast Steamship Co., 225 U. S. 187 (1912).

66. 35 STAT. 65 (1908), 45 U. S. C. A. § 51 (1928).

67. New Orleans & N. R. R. v. Harris, 247 U. S. 367 (1918).

to employ certain minors about freight cars [68] and to preclude recovery under a state survival law despite the absence of such a provision in the federal enactment.[69] However, a state statute permitting an attorney's lien upon the cause of action was upheld as not touching upon the carrier's liability to its employees.[70] The Carmack Amendment to the Hepburn Act forbidding carriers to exempt themselves from liability by contract, rule or stipulation [71] was held to supersede state laws voiding provisions limiting a carrier's liability to the agreed value.[72] In declaring such a stipulation not to constitute a limitation on liability for negligence, the court found that although the Federal Act was silent on the point, its extensive nature excluded state supervision. Provisions in shipping contracts as to time limitations on bringing suit, which had been forbidden by state statute, were declared valid although the Carmack Amendment again was silent on the point.[73] A stipulation in a bill of lading, prohibited by state law, exempting the carrier from liability for loss due to fire was declared enforceable since the court found that Congress had assumed control over the general field of liability and such a stipulation had not been forbidden.[74] A state law invalidating stipulations in a free pass by which the user assumed all the risks of accident was held to be superseded by the Hepburn Act which, although regulating the giving of interstate passes, was silent on the rights of the parties in connection with the use thereof.[75] More recent cases, however, would indicate a trend away from this judicial paternalism in cases where the binding force of precedent has not yet become too strongly entrenched.[76] Thus, it has been held that the Federal Safety Appliance Acts regulating carrier equipment and providing penalties for violations thereof,[77] did not preclude recovery under a state workmen's compensation act.[78] It is believed that, in the vast majority of cases, such a trend should provide for socially more desirable results.

Conclusion

From the foregoing analysis, it is apparent that the doctrine of supersedure, itself a product of judicial construction, has provided the high court with a convenient means of obtaining desired ends. On the whole, this judicial prerogative appears to have been well exercised. Former trends already have been reviewed. With the exception of a few anomalous decisions [79] and those relating to railroad

68. Chesapeake & Ohio Ry. v. Stapleton, 279 U. S. 587 (1929).

69. Michigan Cent. Ry. v. Vreeland, 227 U. S. 59 (1913).

70. Dickinson v. Stiles, 246 U. S. 631 (1918); *cf.* Missouri, K. & T. Ry. v. Harris, 234 U. S. 412 (1914), 10 MICH. L. REV. 641.

71. 34 STAT. 584 (1906), 49 U. S. C. A. § 1 (1-9) (1929).

72. Adams Express Co. v. Croninger, 226 U. S. 491 (1913), 26 HARV. L. REV. 456; Chicago, B. & Q. Ry. v. Miller, 226 U. S. 513 (1913); Chicago, R. I. & P. R. R. v. Cramer, 232 U. S. 490 (1914); *cf.* Boston & Maine R. R. v. Hooker, 233 U. S. 97 (1914).

73. Missouri, K. & T. Ry. v. Harriman, 227 U. S. 657 (1913); *cf.* St. Louis, I. M. & S. Ry. v. Starbird, 243 U. S. 592 (1917).

74. Missouri Pac. R. R. v. Porter, 273 U. S. 341 (1927), 25 MICH. L. REV. 902.

75. Kansas City S. Ry. v. Van Zant, 260 U. S. 459 (1923). But *cf.* Southern Pac. Co. v. Schyler, 227 U. S. 601 (1913).

76. Western & A. R. R. v. Georgia Public Service Comm., 267 U. S. 493 (1925); Missouri-Kansas-Texas R. R. v. Mars, 278 U. S. 258 (1929); Missouri Pac. R. R. v. Norwood, 283 U. S. 249 (1931); Atchison, T. & St. F. Ry. v. Railroad Comm., 283 U. S. 380 (1931).

77. 27 STAT. 531 (1893), 45 U. S. C. A. § 2 (1928); 32 STAT. 943 (1903), 45 U. S. C. A. § 8 (1928).

78. Gilvary v. Cuyahoga Valley Ry., 292 U. S. 57 (1934).

79. E. g., Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 87 (1926), *supra* note 30. It should be noted that the holdings in Northern Pac. Ry. v. Washington, 222 U. S. 370 (1912), *supra* notes 15, 37-39, and Napier v. Atlantic Coast Line R. R., 272 U. S. 605 (1926), *supra* note 29, in which supersedure was declared to exist irrespective of conflict or coincidence, really constitute but another aspect of past judicial paternalism with respect to railroad regulation.

regulation, it is evident that, in the absence of express provisions to the contrary, actual conflict or coincidence has provided the real test as to the supersedure of the state rule. Thus, the extensive theories propounded in relation to Congressional "occupation of the field" despite the absence of conflict or coincidence, appear to find but limited support in the actual holdings. Although a few recent cases have indicated a trend toward the total abandonment of the doctrine,[80] in view of the convenience which the formula may provide on a difficult occasion, such a conclusion would appear to be premature. The result, however, would be of the utmost value in eliminating a virulent source of uncertainty in the law.

A. C.

80. The most recent cases involving the doctrine stress the necessity for conflict or coincidence before the intent of Congress to supersede existing state laws will be implied. Hartford Accident & Indemnity Co. v. Illinois, 298 U. S. 155 (1936); Townsend v. Yeomans, 301 U. S. 441 (1937); Kelly v. Washington *ex rel.* Foss Co., 302 U. S. 1 (1937).